

Terzano v Stuart

2011 NY Slip Op 33668(U)

January 31, 2011

Supreme Court, Nassau County

Docket Number: 021183-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
BRUCE TERZANO,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 021183-09
Motion Seq. Nos: 1 &2
Submission Date: 11/5/10**

-against-

**WALTER STUART, H&F TAXI, INC. and LESPER
CORPORATION,**

Defendants.

-----x

Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Notice of Cross Motion, Affirmation in Support and Exhibits.....x**
- Affidavit in Support/Opposition,**
- Affirmation in Support/Opposition and Exhibits.....x**
- Reply Affidavit in Support, Reply Affirmation in Support and Exhibits....x**

This matter is before the court on 1) the motion by Plaintiff Bruce Terzano (“Terzano” or “Plaintiff”), filed on June 30, 2010, and 2) the cross motion by Defendants Walter Stuart (“Stuart”), H&F Taxi, Inc. (“H&F”) and Lesper Corporation (“Lesper”) (collectively “Defendants”), filed on July 6, 2010, both of which were submitted on November 5, 2010. For the reasons set forth below, including the recent death of Defendant Stuart, the Court stays this action pending the interposition and determination of an application pursuant to CPLR § 1021 for the substitution of a personal representative for Defendant Stuart.

BACKGROUND

A. Relief Requested

Plaintiff moves for an Order 1) severing this action as to Defendants Stuart and Lesper; and 2) pursuant to CPLR § 3215(a), granting Plaintiff a default judgment against Defendant H&F. Defendants oppose Plaintiff’s motion.

Defendants cross move for an Order 1) pursuant to CPLR § 6514(b), cancelling the Notice of Pendency filed by Plaintiff on October 16, 2009 in this action; and 2) pursuant to CPLR § 6514(c) granting Defendants counsel fees in the sum of \$2,000. Plaintiff opposes Defendants' cross motion.

B. The Parties' Background

The Verified Complaint ("Complaint") (Ex. A to Marsh Aff. in Supp.) alleges that, in or about April of 2009, Plaintiff and Defendant Stuart entered into a joint venture agreement regarding "Plaintiff's investment with respect to H & F Taxi and LESPER and the building located at 371 Union Avenue, Westbury, New York 11590" (Compl. at ¶ 13). In accordance with this agreement, Plaintiff allegedly advanced to Stuart the sum of \$166,715.13, in exchange for Plaintiff receiving a 50% interest in H&F and Lesper (*Id.* at ¶¶ 11-14).

The Complaint alleges that 371 Union Avenue, Westbury, New York ("Property"), is the location that served as the residence of Defendant Stuart as well as the principal place of business for H&F and Lesper. The Complaint also alleges that Stuart is the owner of H&F and Lesper (Compl. at ¶ 6).

On or about October 16, 2009, Plaintiff commenced this action in which Plaintiff alleges, *inter alia*, that Stuart breached the terms of the joint venture agreement and seeks monetary damages in the amount of \$166,715.13. The Complaint also sets forth an action to impress a constructive trust upon the Property. Simultaneous with the commencement of this action, Plaintiff filed a Notice of Pendency against the Property (Ex. B to Stuart Aff. in Supp. of Cross-Motion).

The submissions reflect that Defendant Stuart died on March 1, 2010, as reflected by the Certificate of Death provided (Ex. E to Stuart Aff. in Supp. of Cross-Motion). In his Affirmation in Support, counsel for Plaintiff affirms as follows:

Although our office has searched the records of the Nassau County Surrogate's Court, no record of any estate proceeding has been found and although we communicated with counsel who appeared for Walter Stuart, no action on behalf of his estate to join his personal representation to this action has been made by his counsel or other representative of his estate.

Marsh Aff. in Supp. at ¶ 10

Plaintiff submits that the action as to the appearing co-defendants, including Stuart, should be severed, and the Court should grant Plaintiff a default judgment as to Defendant H&F (*Id.* at ¶ 11).

In her Affirmation in Support of her Cross Motion, counsel for Defendants affirms that,

on or about April 26, 2010, she was substituted to represent all Defendants in this action. She provides a copy of a Consent to Change Attorney form (“Consent Form”), executed by Perry Stewart (“Perry”), the “Nominated Executor” (Ex. F to Stuart Aff. in Supp.). She also provides copies of the Verified Answers served by all three Defendants (Ex. C to Stuart Aff. in Supp.)

In response, counsel for Plaintiff affirms that the Consent Form was not served on him prior to service of Plaintiff’s motion, and notes the absence of an affidavit of service reflecting such service. He also avers that, prior to filing its motion, Plaintiff inspected the court file and did not locate an Answer of H&F, or the Consent Form.

Terzano affirms that a review of the file of the Surrogate’s Court of Nassau County, New York revealed that limited Letters *cum testamento annexo* (“c.t.a.”) were issued to Perry Stuart on the Estate of Walter Stuart (Ex. B to Terzano Aff.). Terzano submits that these Letters “do not appear to authorize Perry Stuart to act with respect to the Estate with respect to this pending litigation which appears not to have been disclosed to the Surrogate in either the petition for the order granting limited letters CTA or in the required affidavits of ‘No Debt’” (Terzano Aff. at ¶ 6). Moreover, Terzano notes, there is no evidence that the corporate Defendants executed a consent to change attorney by an authorized corporate representative.

In his Reply Affidavit, Perry affirms that he is Walter Stuart’s son, and that he procured letters appointing him as trustee of individual trusts created by his parents, as well as letters of administration for his father’s estate. Perry submits that he has “the legal authority as well as the moral and legal obligation to operate the defendant corporations while protecting their interests” (Perry Aff. at ¶ 3). Perry outlines the relationship between Stuart and Terzano, and disputes Plaintiff’s claim that the Defendants owe money to Plaintiff.

In her Reply Affirmation, counsel for Defendants affirms that, following discussions with attorney Howard Finkelstein, who previously represented Defendants, as well as the attorney for Stuart’s estate, it was agreed that Perry would be the nominated executor. It is the position of Defendants that there has been no default.

RULING OF THE COURT

As a general rule, if a cause of action survives the death of a party, such death divests the court of jurisdiction until a duly appointed personal representative is substituted for the deceased party. *DLJ Mortgage Capital, Inc. v. 44 Brushy Neck, Ltd.*, 51 A.D.3d 857, 858 (2d Dept. 2008). Where, however, a party’s demise does not affect the merits of the case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution. *Id.*, quoting *Bova v. Vinciguerra*, 139 A.D.2d 797, 799 (3d Dept. 1988). The death of a party stays the action

as to him or her pending the substitution of a legal representative, and any determination rendered without such a substitution is generally deemed a legal nullity. *Reed v. Grossi*, 59 A.D.3d 509, 511 (2d Dept. 2009), quoting *Hicks v. Jeffrey*, 304 A.D.2d 618, 618 (2d Dept. 2003).

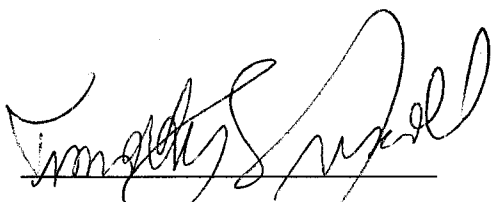
In this action, no party has moved for an Order, and no Order has been entered, directing the substitution of Walter Stuart's legal representative. Given the relationship among the Defendants as set forth in the motion papers, the Court concludes that such a substitution is appropriate. *See, e.g., Reed v. Grossi, supra*, (trial court improvidently exercised discretion in granting defendants' cross motion to dismiss complaint and denying motion by deceased plaintiff's executrix to substitute herself as party-plaintiff). Accordingly, the Court directs that this action is stayed until the interposition and ultimate determination of an application pursuant to CPLR § 1021, which sets forth the substitution procedure.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
January 31, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE